



# California Fair Political Practices Commission

December 31, 1985

Gary J. Mello  
Councilmember  
City of Fremont  
135 Morrison Canyon Road  
Fremont, CA 94538

Re: Your Request for Advice,  
Our File No. A-85-259

Dear Mr. Mello:

This is in response to your letter, dated December 12, 1985, in which you requested advice concerning the application of the Political Reform Act (the "Act").<sup>1/</sup>

## FACTS

You are a member of the Fremont City Council. Currently you are employed as a manager for Bissell & Karn, Inc., a private civil engineering consulting firm. Bissell & Karn, Inc. has less than \$2,000,000 of net tangible assets and is not: listed on the New York or American Stock Exchanges; listed on the National Association of Securities Dealers National Market List; a corporation which qualifies for public sale.

## QUESTIONS

You are contemplating leaving Bissell & Karn, Inc. and becoming a private consulting civil engineer. You wish to know:

1. Whether you may vote on Bissell & Karn, Inc. projects that come before the City Council when you are contracting with

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<sup>1/</sup> Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise specified. As you are aware, your situation may raise questions covered by Government Code Section 1090. Because the Commission is not authorized to give advice regarding that law, we have suggested that you contact the Attorney General's Office concerning its application; you have advised us that you have contacted that office.

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Bissell & Karn, Inc. on other projects located outside of Fremont?

2. Whether you may vote on a project before the City Council when Bissell & Karn, Inc. has been selected to do the engineering for that project?

3. Whether you can vote on a project before the City Council when it is possible that Bissell & Karn, Inc. may later be selected to do the engineering on that project?

#### CONCLUSIONS

1. Disqualification would be required any time Bissell & Karn, Inc. appeared before the City Council, regardless of whether you remain an employee or do contract work for Bissell & Karn, Inc. on projects outside Fremont.

2. Disqualification would be required if Bissell & Karn, Inc. could be materially effected by the decision.

3. Disqualification would be required if there was a sufficient likelihood that Bissell & Karn, Inc. would be selected to be the engineering consultant for the project and the decision could have a material financial effect on Bissell & Karn, Inc.

#### ANALYSIS

The Act prohibits public officials from making, participating in making or in any way attempting to use their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. Section 87100.

An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:

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(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status,

aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

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#### Section 87103

Currently, as an employee and manager for Bissell & Karn, Inc., the corporation is a source of income to you (Section 87103(c)) and you have an economic interest in that corporation as a manager (Section 87103(d)). Accordingly, you must refrain from participating in any governmental decision where it is reasonably foreseeable that the effect of that decision would have a material financial effect on Bissell & Karn, Inc., which is distinguishable from its effect on the public generally.<sup>2/</sup>

As a private consultant contracting with Bissell & Karn, Inc., the Act would still be applicable because the corporation would be a source of income to you (Section 87103(c)).

To assist public officials in determining whether they may vote in certain situations the Commission has adopted a regulation (2 Cal. Adm. Code Section 18702.1) which in pertinent part states:

. . . a public official shall not make, participate in making, or use his or her official position to influence a government decision if:

(1) Any person (including a business entity) which has been a source of income (including gifts) to the official of \$250 or more in the preceding 12 months appears before the official in connection with the decision;

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<sup>2/</sup> Generally, an industry, trade or profession does not constitute a significant segment of the public to qualify for the "public generally" exception. A single company clearly would not qualify for such an exception. See, 2 Cal. Adm. Code Section 18703.

(2) Any business entity in which the official has a direct or indirect investment of \$1,000 or more, or in which the official is an officer, director, partner, trustee, employee, or holds any position of management, appears before the official in connection with the decision;

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1. As an employee and manager for Bissell & Karn, Inc. it is clear that you would be required to disqualify yourself from participating in any decision in which Bissell & Karn, Inc. was appearing<sup>3/</sup> before the City Council on behalf of one of its own projects.

Similarly, as a consultant who has received \$250 or more in income from Bissell & Karn, Inc. you would be required to disqualify yourself whenever Bissell & Karn, Inc. was appearing before the City Council regardless of the fact that you only worked on projects for them outside of Fremont.

2. When Bissell & Karn, Inc. has been hired to do the engineering on a project, disqualification would be required when the effect of the governmental decision on Bissell & Karn, Inc. would be material. 2 Cal. Adm. Code Section 18702.2 outlines the tests for materiality with respect to business entities. Because Bissell & Karn, Inc. is not authorized to sell its stock to the public and meets none of the other

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(b) A person or business entity appears before an official in connection with a decision when that person or entity, either personally or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request;

(2) Is a named party in the proceeding concerning the decision before the official or the body on which the official serves....

2 Cal. Adm. Code Section 18702.1(b)

criteria, subsection (g) of the regulation applies. Under that provision, the effect of a decision will be material if:

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(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of \$10,000 or more.

2 Cal. Adm. Code Section 18702.2(g)

Consequently, disqualification would be required if any of these monetary effects would result from the governmental decision.

3. When a governmental decision concerning a specific project is pending before the City Council and there is a sufficient likelihood that Bissell & Karn, Inc. will later be selected to do the engineering on that project, then it is reasonably foreseeable that the decision will have a financial effect on a business entity which is a source of income to you.

This situation is similar to the one discussed in the Commission's Thorner Opinion.<sup>4/</sup>

In Thorner, the Commission was asked whether a water district director, who was also a supplier of construction material, could participate in a decision on a project when the contractor for that project was a regular customer of the director. Even though the contractor had not yet decided whether to purchase supplies from the director or another supplier, the Commission concluded that there was sufficient likelihood the director would receive some business from the

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<sup>4/</sup> Opinion requested by Tom Thorner, 1 FPPC Opinions 198 (No. 75-089, December 4, 1975).

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contractor to make the financial effect on the director  
"reasonably foreseeable."

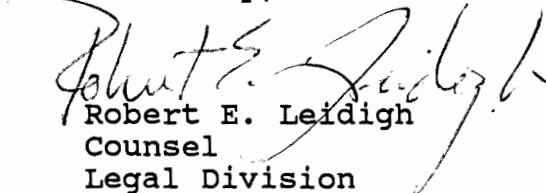
Whether or not there is a sufficient likelihood that  
Bissell & Karn, Inc. would be selected to do the engineering  
for a specific project depends on the facts of that particular  
case.

As stated previously, disqualification would be required if  
the reasonably foreseeable financial effect of that decision on  
Bissell & Karn, Inc. would be material under the guidelines  
contained in 2 Cal. Adm. Code Section 18702.2(g), supra.

As you can see, disqualification will depend on the  
particular facts surrounding a specific governmental decision  
regardless of whether you remain an employee of Bissell & Karn,  
Inc. or become a private engineering consultant.

Please do not hesitate to contact us again should you  
require advice regarding a specific situation.

Sincerely,

  
Robert E. Leidigh  
Counsel  
Legal Division

REL:JG:nwm

DEC 16 9 36 AM '85 135 Morrison Canyon Road  
Fremont, CA 94538

December 12, 1985

Mr. Bob Leidigh  
State of California  
Fair Political Practices Commission  
P. O. Box 807  
Sacramento, CA 95804

Dear Mr. Leidigh:

As a follow-up to our recent telephone conversation, I am writing this letter to request your office's opinion about several possible situations in which I may find myself and will need to make a decision regarding voting as a Fremont City Council member.

I am currently employed by Bissell & Karn, Inc., Civil Engineers, a private civil engineering consulting firm headquartered in San Leandro. My position is manager of the firm's Milpitas office of 20 employees. However, I will be terminating my employment by Bissell & Karn, Inc., and intend to become a private consulting civil engineer after January 1, 1986. Therefore, my questions should be answered based on my being a private consulting civil engineer.

The company I currently work for, Bissell & Karn, Inc., is: (1) not on the New York or American Stock Exchange, (2) not on the National Association of Securities Dealers National Market List, (3) not a corporation which qualifies for public sale, and (4) has less than \$2,000,000 of net tangible assets.

My questions are as follows:

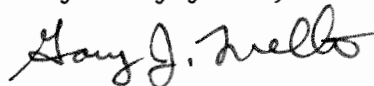
1. If, as a consultant, I contract for work with Bissell & Karn, Inc. on projects located outside the City of Fremont, can I vote on Bissell & Karn, Inc. projects that come before the City Council? If the majority of my income from my consulting practice comes such Bissell & Karn contracts, does that change your reply?
2. If Bissell & Karn, Inc. does the engineering on a project in Fremont, can I vote on it if it comes before the City Council? If the answer is no, are there conditions where I can vote on it?
3. If a project comes before the City Council for which an engineer has not been selected and for which Bissell & Karn may be selected, can I vote on it? If the answer is no, are there conditions where I can vote on it?
4. Under the circumstances outlined above, are there any other restrictions of which I should be aware that could affect my ability to vote on any project?

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5. How does California Administrative Code Section 18702.1 relate to the previously stated questions?
6. Are there any amount of fees above \$250, or any maximum percentage of my actual consulting fees as a private consulting engineer that I could receive from Bissell & Karn, Inc. that would allow me to vote on issues?
7. In addition to State Government Code Sections 1090 and 1091, are there any other laws that I should be aware of that deal with contracts, especially those which would speak to the ability of Bissell & Karn, Inc. being able to enter into contracts with the City of Fremont (with me being a private consulting civil engineer to them, on work exclusively outside the City of Fremont)?

Please respond to these questions as soon as possible, because time is very much of the essence. Thank you very much for your help. It is greatly appreciated.

Very truly yours,



Gary J. Mello  
Fremont City Council Member

GJM:lk

cc: Richard W. Karn, President, Bissell & Karn, Inc.  
Allen Sprague, City Attorney, City of Fremont





# California Fair Political Practices Commission

December 16, 1985

Gary J. Mello  
135 Morrison Canyon Road  
Fremont, CA 94538

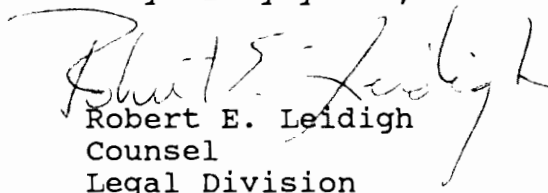
Re: A-85-259

Dear Mr. Mello:

Your letter requesting advice under the Political Reform Act has been received by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact me directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or unless more information is needed to answer your request, you should expect a response within 21 working days.

Very truly yours,

  
Robert E. Leidigh  
Counsel  
Legal Division

REL:plh

cc: Allen Sprague, City Attorney, City of Fremont